No. 3935

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

S. L. SELIG, as claimant of the Gas Power Boat "Eagle", her engine, apparel, tackle and furniture, and J. R. HECKMAN, stipulator,

Appellants,

vs.

MARY L. BRINDLE, as executrix of the estate of ALEXANDER BRINDLE, deceased,

Appellee.

BRIEF FOR APPELLEE.

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Statement of the Case.

The Wildwood was southbound; the Eagle, northbound. The Eagle rammed the Wildwood, striking her about eight feet from the stern; only the Wildwood was damaged. The libel charged sole liability of the Eagle; the Answer charged sole liability of the Wildwood,—alleging only three faults, to-wit: That the Wildwood (1) failed to exhibit lights, (2) failed to sound a whistle, and (3) attempted to make a port to port passing (Answer, par. V. p. 21.)

The proof showed that the Wildwood displayed all the required lights and that the Eagle displayed none; that the Wildwood did not attempt to make a port to port passing but that the Eagle did so attempt, and that the failure to sound the whistle did not contribute and could not have contributed to cause the collision. The proof showed further that it was not a clear moonlight night, and that Ryan, master and helmsman of the Wildwood, was a licensed and competent master, and that he did not leave the pilot house while the vessels were in the danger zone.

Until the argument in the court below claimant (appellant) gave no intimation of any charge of negligence of the Wildwood except in the three particulars mentioned in the answer;—after the proof had been submitted, however, he abandoned the contention that the Eagle was not at fault and sought, and does now seek, to charge the Wildwood with negligence not alone in the particulars set out in the answer but also in certain other particulars not there set out—seeking thereby to obtain a "division of liability".

The lower court found the Eagle to be solely at fault, and assessed damages accordingly. Claimant appealed and now contends only for "mutual fault"; appellee contends for sole liability of the Eagle and for an increase of the sum assessed as damages to the hull, and for interest.

Summary of Brief and Argument.

I.

AS TO LIABILITY.

(A) The evidence clearly shows violations of statutory requirements as to displaying lights, as to "porting the helm" and "keeping clear", and other acts of gross negligence, on the part of the Eagle and her crew; sufficient to account for the collision and directly and immediately causing the collision. Discussed in A, p. 4 et seq. infra.

(B) Such showing having been made, the Eagle, if it would escape sole liability, has the burden of establishing contributory negligence of the Wildwood by "equally clear" evidence and any doubts on that score are to be resolved in favor of the Wildwood. Authorities under B and C at p. 13 et seq. infra.

(C) The Eagle did not sustain the burden cast upon her, but the Wildwood has sustained every burden which she was called upon to bear. Discussed in C, p. 14 et seq.—authorities, infra.

II.

AS TO DAMAGES.

(D) The evidence shows that the amount awarded as damages to the hull should be increased. Interest at 8% per annum from date of collision should be allowed on all sums awarded. Evidence,

discussion and authorities under D at p. 43 et seq. infra.

A.

THE EVIDENCE SHOWED CLEARLY THAT THE EAGLE VIOLATED THE STATUTE BY TRAVELLING AT NIGHT, IN THE SHADOWS WITHOUT LIGHTS AND BY NOT COMPLYING WITH THE "PORT HELM" AND "KEEP CLEAR" LAW; AND WAS OTHERWISE GUILTY OF NEGLIGENCE—ALL DIRECTLY AND IMMEDIATELY CAUSING THE COLLISION.

There were *five eye witnesses* of the collision, viz: *Mrs. Kinyon* (wife of the lighthouse keeper,—at the lighthouse at the time), *Mr. Kinyon* (husband of said Mrs. Kinyon—at the lighthouse at the time), *Ryan* (master and helmsman of the Wildwood—at the wheel at the time), *Ames* (deckhand and helmsman of the Eagle—at the wheel at the time), *Olander* (connected with Eagle, capacity not apparent,—in Eagle's pilot house at the time). All of these except Olander testified in the lower court.

In addition *Selig,* owner and claimant of the Eagle, who was below at the time of the collision, gave some testimony as to lights, etc.

The other witnesses in the record gave testimony as to damages only.

MRS. KINYON (87)

This witness testified that she, expecting the mail boat Carmen from the north, looked in that direction and distinctly saw to the northerly and easterly of said lighthouse the bright white light of the southbound vessel (Wildwood) about one mile dis-

tant (88). "It was what I consider a very good light and I see many of them pass" (101) At first she did not see the green (starboard) light, but on looking again as she entered the lighthouse porch she observed on said vessel "a very green light" (89), and "by the arrangement of the light I knew that it wasn't the Carmen" (89). "I took close observation on account of trying to figure out whether that was the Carmen, you see" (95). She continued to observe this white light and this green light until the vessel passed the lighthouse (91) when she lost the green light (99) but continued to see the white light until the very moment of the collision (91, 99, 101, 106).

At or about the time she first observed this white light she heard the exhaust of another boat coming from a southerly direction (89). "*We looked* for the lights of this boat and *couldn't see none* though we could hear her exhaust distinctly" (89). "*A few seconds* before the collision occurred, the northbound boat flashed on her lights and when she struck the southbound boat I could distinctly see three lights—a red light, a green light and a white light" on the northbound boat (90). "The southbound boat was the Wildwood, the northbound boat was the Eagle (92). The Wildwood was nearer the (Mary Island) shore than the Eagle (97). The collision occurred in the sheen of the moon (93). The lights on the Eagle were snapped on when the vessels were sixty or one hundred feet apart, possibly (101). "Just momentarily before they struck

the helmsman (of the Eagle) must have directed his course directly toward us" (91). Both vessels turned inshore just before the collision (121). She watched them come together and distinctly heard the crash (101). From the time when the lights flashed on on the Eagle to the time of the collision was "such a short time there was no time for thinking" (102).

MR. KINYON (106)

Mrs. Kinyon is corroborated by her husband, David Oliver Kinyon. Kinyon says that he saw the headlight or mast headlight, but he would not swear that he saw the green light, of the southbound boat as "I paid no particular attention" (108). He picked up the northbound boat (Eagle) about a mile away, with the binoculars, and he watched her for about four minutes (108-9); he saw no lights on her; he "looked for them and didn't see them." "They were not there." "I most assuredly would have seen them if they had been there." "I didn't observe any lights in the port holes." "It was dark" (119). But about two seconds before the collision the Eagle flashed on her lights—he first saw her red light and headlight and then her other side light (116-7). In that two seconds she headed toward the island. She made a sharp turn—"turned hard over and came around quick" (117) "just about as sharp as she could turn" (118) both vessels turned inshore towards Mary Island (123).

Ryan (136)

The testimony of Ryan, Master of the Wildwood, corroborates, as far as it goes, the testimony of the Kinyons.

Ryan says, all the lights of the Wildwood were burning (137 bottom) and that he saw no light ahead but "all of a sudden I thought I seen a shadow ahead and just then the lights of a boat flashed on, headed straight at me on the port bow. I seen the headlights and the two side lights of the boat. I seen them all at the same time and I promptly swung the helm to port which put the boat to starboard; and she rammed us right there." The other boat swung to the Island too (138-9). The lights of the Eagle flashed on not more than three or four seconds before she struck the Wildwood. The Eagle struck the Wildwood about eight feet from the stern on the port side. When the Eagle flashed on her lights she was 100 or 125 feet from the Wildwood—possibly less (139).

It is submitted that this tallies with Mr. Kinyon's testimony to the effect that the first light he saw on the Eagle was her port light (red) (117) and that almost immediately after that he saw both the port and starboard lights of the Eagle; for the Eagle being headed north and Kinyon being to the west he would not at first have seen both lights but after the Eagle swung to the island he would and did see both lights, whereas, the Eagle and Wildwood being nearly head on, Ryan would and did see both lights at one and the same time.

Ames (206)

Witness for claimant: Admits that the Wildwood turned to starboard but says that the Eagle also turned to starboard (222). Says the Eagle had lights and he never saw the Wildwood's lights, except one dim white light.

Selig (230) claimant:

Although not an eye witness, testifies that he, himself, put on the lights of the Eagle about fifteen minutes before the collision. The collision occurred at about 10:20 p. m. (263). For twenty minutes before the collision the Eagle had been traveling in the shadows and that that was dangerous part of the trip (260-261). Immediately after the collision he noticed that the wheel of the Eagle was hard aport (245).

Whom to believe?

There is, then, the testimony of Selig and Ames against that of Mr. Kinyon, Mrs. Kinyon and Ryan. We think this court cannot be in doubt as to whom to believe. The following considerations suggest themselves:

(a) Selig and Ames are interested while the Kinyons are absolutely disinterested. Selig and Ames did not fare very well on cross-examination while the Kinyons and Ryan were unshaken. The trial judge who heard the witnesses, observed their demeanor, etc., believed the Kinyons and Ryan and disbelieved Selig and Ames, saying: "These wit-

nesses (the Kinyons) gave a clear, detailed and unbiased account and their testimony is entitled to the highest credit" (28).

Selig "doth protest too much", while Ames is weak on direct, uncertain and evasive on cross, and swift to follow the lead on redirect—only to be again discredited on cross.

The calling and experience of the Kinyons qualify them as observers. Mrs. Kinyon was for three and a half years at Destruction Island Lighthouse, one year at Possession Island Light, sixteen months at Tree Point Light, North Island three years, Mary Island one year, and at East Brother Light Station on San Francisco Bay (157). She had a special reason for observing and she kept a "daily diary" in which she entered an account of what happened (137). It is true that on objection of claimant the diary was excluded (137), but it was offered, and the fact that she kept it strengthens her testimony.

(b) Olander, a member of the crew of the Eagle, who was in the pilot house at the time of the collision—the only eye witness on the Eagle, except Ames—, does not testify. Although Selig knew just when this case was coming to trial and saw Olander six or seven weeks before the trial and knew that Olander was the only other person except Ames who was in the pilot house of the Eagle at the time of the collision, yet he took no steps whatever to secure his testimony at the trial in the lower court (253-4) *and the record fails to reveal that he has taken any steps to secure his testimony*

for this hearing, although he has had ample time to do so and although he knew the absence of Olander was a strong point against him. The trial judge said:

> "It seems that the testimony of Mr. Olander * * * could have been procured by the claimant, as his whereabouts was known until six weeks prior to the time of the hearing but was not produced at the hearing and his, Olander's, testimony is entirely lacking although it would have been very material" (26).

Whatever excuse might have been urged for the non-production of Olander's testimony at the trial in the lower court, there is no excuse for its non-production at this trial. Claimant knows now (if he did not know before) the importance of that testimony,—knows that he could obtain a commission from this court,—and knows that the absence of that testimony did, and must now, weigh heavily against him, and yet he has taken no steps to procure it.

> "Where officer or crew of a vessel not sworn there is a strong presumption that their evidence would have been against the vessel."
>
> *The New York,* 175 U. S. 187; 44 L. Ed. 126;
>
> *The Georgetown,* 135 Fed. 855, 859 and cases cited;
>
> *The Prudence,* 191 Fed. 993, 996.

(c) In the libel Selig swears that the Wildwood attempted to cross the Eagle's bow (Answer, par. IV, p. 19). He was not an eye witness and must have gotten his information from Ames, and yet he

swore at the trial that Ames told him that the Eagle cut across the Wildwood's bow (248). It is not denied that the Wildwood was nearer the Mary Island shore than was the Eagle nor that the Eagle's course was northerly and the Wildwood's course southerly, nor that the Wildwood turned to starboard, i. e. toward the island. How then could the Eagle by porting her helm cut across the Wildwood's bow? The Eagle could not cut across the Wildwood's bow except by starboarding her helm. If the Eagle had ported her helm it would have taken her away from the island, not toward the island—away from the Wildwood, not toward the Wildwood.

(d) The trial court finding the Eagle solely liable, said:

> "I can, therefore, come to no other conclusion than that the proximate cause of the collision was the negligence of the 'Eagle', first, in traveling after nightfall without lights, and, second, in not turning to the starboard on discovery of the 'Wildwood' "(31).

(e) Ames intoxicated?

There is evidence that Ames was intoxicated. The Eagle was returning from Prince Rupert, B. C., where prohibition does not obtain; Harold Brindle "noticed that Al. Ames was drunk" (125) (131-2); saw several empty bottles on the bunk back in the pilot house, smelling very strongly of whiskey (125). Ryan says Ames was drunk (140)—saw empty bottles (141) (154); half full whiskey bottle in the

forecastle. Selig offered him a drink (156). This denied by Selig—he says the bottle contained distilled water (272).

(f) The testimony of Ames and Selig, interested and discredited as it is, and further weakened by the non-production of Olander, is entitled to little or no weight as against the disinterested and unshaken testimony of the Kinyons and that of Ryan.

Eagle attempted to cross Wildwood's bow.

Whether the vessels be considered as meeting end on or nearly so, or as crossing, the Wildwood did the right thing and the Eagle did the wrong thing. If they were meeting end on the Eagle should have gone to her starboard. She went, however, to her port. If they were crossing, the Eagle, having the Wildwood on her starboard, must keep out of the way of the Wildwood (Art. 19)—instead of so doing she turned the wrong way—directly toward the Wildwood, and rammed her.

Selig says:

> "I said to the boys, 'Now tell me how this happened—see!' And the boys just told me how the boat was and they placed her off the starboard bow about two points, and Mr. Ames said, 'I tried to get clear, reversed my engine and throwed the wheel over *and cut across the bow,* and we were too close before they could get away from each other' " (248).

A sober, intelligent and well versed seaman would have known that he had no call to cut across her bow. He cut across the bow at his peril.

The America, 37 Fed. 813.

B.

THE EAGLE'S FAULTS. BURDEN TO HER. THE LAW.

We think, then, that the evidence establishes the following faults on the part of the Eagle, viz.:

(I) In running at night without lights, thus violating the statute and precluding the Wildwood from seeing her.

(II) In not seeing the Wildwood's lights.

(III) In turning to port instead of to starboard, thus violating the statute and directly causing the collision.

These delinquencies and shortcomings on the part of the Eagle, clearly show negligence, unskilfulness and violation of statute, continuing up to the time of, and directly causing the collision, and make out a case of gross negligence against the Eagle which must hold her to sole and full liability, unless she has shown *by equally clear evidence* that the Wildwood was guilty of negligence and that such negligence contributed to the casualty. This is the Eagle's burden under the authorities.

> "Where the fault of one vessel is clear and is sufficient to account for the collision she has the burden of establishing the *contributory* fault of the other vessel by *equally clear evidence.*"

The Umbria, 166 U. S. 404;

The Oregon, 158 U. S. 186-197;

The Ludwig Holberg, 157 U. S. 60, 71;

The City of New York, 147 U. S. 72, 85;

Comparia v. Boston, 278 Fed. 868;

The Lexington, 275 Fed. 280;

Otto V. Fiegler, 259 Fed. 435;
The North Point, 205 Fed. 958;
The Ashbourne, 181 Fed. 815;
The Saratoga, 180 Fed. 620;
The Pocomoke, 150 Fed. 193;
A. S. S. Co. v. American, 129 Fed. 65.

"Where the faults of one vessel are so gross as to fully account for a collision any doubts as to the proper management of the other should be resolved in her favor."

The City of New York, 147 U. S. 72, 85;
The Lowell M. Palmer, 142 Fed. 937-943;
N. A. Dredging Co. v. Cutler, 162 Fed. 457, 9th Circuit;
The Persian, 224 Fed. 441;
Baltimore v. Coastwise, 139 Fed. 777.

C.

The Eagle has not sustained her burden. The Wildwood has sustained her burden.

The specifications of contributory negligence on the part of the Wildwood which are set forth in the Answer, as well as those additional specifications which are here relied on, are epitomized in Assignments of Error Nos. 8 to 22, incl. (287), and same are here answered as follows:

(1) The claim that the Wildwood was in fault in not maintaining an efficient lookout (Assignments Nos. 8, 13, 17, 18, 20, 21, 22).

Answer:

(a) Presumptions:

The displaying of proper lights and the *direction as to the way to turn,* are statutory; and failure to obey the statute is presumptively (at least) negligence. (*The Pennsylvania,* 19 Wall. 125.) This failure on the part of the Eagle to display lights and to turn to starboard was clearly shown and shown also was it that such failure was the direct and immediate cause of the casualty. The burden, then, was on the Eagle to show "by equally clear evidence" that the Wildwood was guilty of contributory negligence.

Appellant claims that he has sustained this burden by showing that the Wildwood had no lookout stationed in the bow and on page 49 of his brief he contends that

> "The Wildwood must show that her violation of the collision rules *could not* have contributed to the result before she can escape responsibility for mutual fault and a divided liability."

Wildwood need not show that absence of lookout in bow could not have contributed.

If by "collision rules" appellant means only *statutory* rules, we assent to the proposition as stated, but if he includes the prudential rule Art. 29 we cannot agree. Appellant (on p. 49) cites *The Pennsylvania,* 19 Wall. 125; 22 L. Ed. 148, and says "We see no reason why the reasoning of the court in that case should not apply." Appellee sees no reason. The case does not aid appellant in the slightest

degree. The excerpt which he quotes is against him, to-wit: *"is in actual violation of a statutory rule."* There both vessels violated the statute, and the presumption was that each violation contributed to cause the collision; the court saying, "Such a rule is necessary to enforce obedience to the mandate of the statute." But in the case at bar, while appellant twice violated the statute (to-wit he turned to the *left* and he displayed no lights), yet the utmost that can be said against the Wildwood is that she had no special lookout in the bow of the boat. The latter failure is not a violation of statute but only of a prudential rule. If the Wildwood had not displayed lights, then we grant that her burden would have been as heavy as that of the Eagle; that is to say each vessel would have had the burden of proving that its violation of statute did not contribute and *could not* have contributed to cause the collision.

The difference between the presumption arising from violated statute and that arising from other negligence is aptly referred to in *The Providence,* (282 Fed. 658-663, decided July 11, 1922). There The Providence libeled the Georgia. The evidence showed violation of statutory rules on part of the Georgia directly causing the collision. The Providence contended that any doubts regarding its own management should be resolved in its favor, citing cases. The court would have applied the rule then contended for, had it not been that the Providence was itself in violation of *statutory* rules. The court said:

> "But we are met by the fact that the case of the Providence discloses a *statutory fault,* noncompliance with Article 16. We have a *collision of presumptions* and a *disturbance of the ordinary rules* concerning the burden of proof which were applied before the adoption of the second paragraph of Article 16. The question whether a specified act of negligence is a cause of the accident is a question of fact and not of law. *Marsden on Collisions* (6th Ed.) p. 20. *But from a proven statutory fault* there arises a presumption of the contribution of this fault to the collision. *The Martello,* 153 U. S. 64-74; 38 L. Ed. 637; *The Pennsylvania,* 19 Wall. 125; 22 L. Ed. 148."

The case of the *Fannie Hayden,* 137 Fed. 280, cited by appellant at page 42 of his brief is to the same effect. In that case it was sought to hold the Lettie May for contributory negligence in that she had no proper lookout, but the court says on page 283:

> "We have not found that the Lettie May had violated or disregarded any statutory regulations. * * * Where it appears that the vessel has only neglected the usual and proper measures of precaution and has not violated any statutory regulations, the burden on her to show that the collision was not owing to her neglect as the efficient cause is only the ordinary one."

None of the other cases cited by appellant on this point go so far as to hold that the absence of a lookout stationed in the bow throws upon the vessel so offending the burden of proving that such absence *could not* have availed to prevent the collision —certainly not in cases where the gross negligence

and violation of positive statute by the other vessel directly and immediately caused the collision. To so hold would be to go counter to the uniform holding of the Supreme Court.

> "Where the fault on the part of one vessel is established by *uncontradicted* testimony, and said fault is of itself sufficient to account for the disaster, it is not enough for said vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt as to the conduct of such other vessel should be resolved in its favor." (*Alexandre v. Machen* (*The City of New York*), 137 U. S. 72, 85; 37 L. Ed. 84.)

[In the case at bar, it is the same as if the fault of the Eagle were established by *uncontradicted* evidence for by the waiver of assignments of error on that point the case now is as if there were no appeal on that point. This establishes the fault of the Eagle (*The Atlantic,* 119 Fed. 568-572; *The Livingstone,* 113 Fed. 879-881).]

> "These defficiencies in the watch are rather evidences of negligence and lax management * * * than distinct faults in themselves and would not be sufficient to condemn the vessel *in the absence of evidence that they contributed to the collision.* The question still remains, what was the particular act or omission which brought about the collision." *The Oregon, supra.*

And this from *The Victory and The Plymothean,* 168 U. S. 410:

> "The *recognized* doctrine is thus stated by Mr. Justice Brown in the *Umbria,* 166 U. S.

> 404-409, 'Indeed *so gross* was the fault of the Umbria in this connection that we should unhesitatingly apply the rule laid down in the City of New York, 147 U. S. 72-85, and the Ludwig Holberg, 157 U. S. 60-71, that any doubts regarding the management of the other vessel *or the contribution of her faults, if any* to the collision should be resolved in her favor'."

However gross was the fault of the Umbria in that case, it could not have been grosser than the fault of the Eagle, for by traveling at night in the shadows without lights the Eagle not only "flew in the face" of the statute but also gave indication of a reckless indifference to her own fate as well as the fate of others—a sheer invitation to calamity,—and by disregarding the "port helm" or "keep clear" rule—the "turn to the right" rule—she but added ignorance, stupidity, unskilfulness or intoxication to that "nautical sin" which was of itself sufficient to deprive her of salvation.

Sufficient if evidence leaves the matter of contribution in doubt.

So that the utmost appellant can successfully contend for is this, to-wit: That he has sustained the burden cast upon him, by showing that the Wildwood had *no lookout stationed in the bow of the boat;* and that having shown that fact the presumption is that the absence of a lookout so stationed *did contribute* and that appellee must rebut that presumption by showing that such absence *did not contribute.* Certainly he has no foundation for

contending that appellee must show that such failure *could not have contributed.*

But even the presumption that the absence of a lookout in the bow *did* contribute is strong or weak according to the facts and circumstances.

From the Umbria case we must gather that when the negligence of the one vessel is *gross,* the presumption arising from a fault of the other is overcome if the evidence shows that there are

> "any doubts regarding the management of the other vessel *or the contribution of her faults* to the collision";

and a late case is to the effect that such presumption

> "could not apply to a case where it is merely speculative whether the pilot could have done anything that would have avoided the collision, nor to a case where it is uncertain whether a duly vigilant lookout would have made the discovery substantially earlier than the pilot did make it."
>
> *Otto Marmet Coal Co. v. Fieger,* 259 Fed. at page 447.

Chief Justice Taney in *Harvey v. Baltimore* (23 How. 292; 16 L. Ed. 562), albeit in a dissenting opinion, said:

> "It has been argued that the lookout ought to have been in the bow, and some passages in the opinions of this court in former cases are relied on to support this objection. But the language used by the court may always be construed with reference to the facts in the particular case of which they are speaking, and the character and description of the vessel. What is the most suitable place for a lookout is obviously a ques-

> tion of fact, depending upon the construction and rig of the vessel, the navigation in which she is engaged, the climate and weather to which she is exposed and the hazard she is likely to encounter'';

Appellant is forced to dwell upon and emphasize those decisions of this court and of other courts to the effect that the proper location of a lookout is in the bow or "eyes of the ship''. Most of the cases so holding have been cases of tugs doing harbor work or of other vessels in the track of extensive commerce, or of vessels in fogs where lights are not easily seen, but in every case the rule depends for its application on the circumstances.

The Tillicum case.

Great stress is put by appellant on the *Tillicum,* 217 Fed. 976, affirmed by this court in 230 Fed. 415, but the case is inapplicable.

In that case the Tillicum had no lookout except in the pilot house and the court held her to the task of proving that that fact did not contribute; but there, the Rosalie, the colliding vessel, was not guilty of *gross* negligence. She stopped on hearing the Tillicum's fog whistle, but she did not stop for a long enough period of time. She was guilty of negligence but not of such negligence as called for the application of the rule laid down in the Umbria, and kindred cases. If she had been guilty of *gross* negligence (as, for instance, if she had not stopped at all, or had blown no fog signals) we ap-

prehend that the "Umbria" rule would have been applied.

Now the case at bar presents such facts as *do* call most loudly for the application of the rule of the "Umbria". Here was the grossest kind of negligence on the part of the Eagle. For a steamer to travel at night in shadows, without lights is a flat defiance of statute and of that immemorial custom upon the observance of which "those who go down to the sea in ships" have a right to rely.

The Tillicum case differs from the case at bar, in this also, to wit: There, the vessels were of considerable size and they were in a "dense general fog", in the harbor of Seattle and in the track of extensive commerce, and the Tillicum had a barge alongside whose bow projected beyond the bow of the tug, and the barge was loaded with oil tank cars which extended upward a considerable distance from the deck of the barge. Each vessel had heard the fog whistle of the other and knew that a collision was "in the cards". At best the location of each vessel could only be determined approximately by the fog signals. The vagaries of sound are well known. Sound is often strangely deflected by intervening objects. The Rosalie approached the Tillicum on ~~from~~ the "barge side" and it was probable that a lookout in the pilot house could not locate the Rosalie as accurately as a lookout stationed forward on the barge could have done. But in the case at bar there were two small fishing vessels, neither of which carried passengers. They were not in a "crowded port" nor in a port at all nor in the track of

any extensive commerce nor in a fog. Neither of them had a lookout in the bow. The Wildwood was only 45 feet long and a lookout stationed in the bow would have been only a few feet from the pilot house. The Wildwood was not expecting and had no reason to expect that a vessel would loom up out of the darkness. There was no intervening object to obscure a light, if there had been a light on the Eagle; but as there were no lights on the Eagle, a lookout could not have seen that which was not there to be seen. Could he have seen the Eagle even though she had no lights? Ames says No (210). No witness says Yes. Could a lookout stationed in the bow have seen the outline or shadow of the Eagle when the Eagle was travelling in the shadows? Consider the darkness of the night especially upon the water (Answer, pp. 17 and 18; Selig, 311-345; 260, 261, 341, 345, 346; Kinyon, 145, 110; Mrs. Kinyon, 104; Ames, 223).

It is easy enough to point out evidence showing that a special lookout *in the pilot house* of the Wildwood would not have seen the "dark object" any earlier than did Ryan. We need only refer to the evidence of Ames and to the allegation of the answer that Ames and Olander kept a sharp and vigilant lookout and were unable to see the Wildwood when she was only fifty or sixty feet distant from the Eagle. Ryan, then, though alone in the pilot house of the Wildwood, was a good lookout for he saw as well as Ames and Olander and they are said to have been

sharp and vigilant, and yet unable to see the Wildwood because according to the answer the night was dark and she had no lights.

Again, a lookout in the bow would have been only about twenty or twenty-five feet ahead of Ryan. With a boat traveling, as the Wildwood was traveling, at the rate of ten feet per second, this 20 or 25 feet advantage corresponds in point of time to 2 or 2½ seconds. Grant then that a lookout in the bow would have seen "It", 2 or 2½ seconds before Ryan saw "It", what was "It"? Nothing but a dark object without lights. The lookout would not know what it was nor which way it was heading if it was moving at all. Ames and Olander could not distinguish those particulars although they were within 50 or 60 feet of the Wildwood. Before a lookout in the bow of the Wildwood could have determined what the object was and whether it was moving, and if so which way it was heading, i. e. before he could determine whether any danger threatened and could communicate to Ryan, the 2 or 2½ seconds would have elapsed. Two or two and a half seconds is almost *"instantaneously"*. We do not believe the court is going to compel us to figure so closely, in the face of the clearly proven gross negligence and violation of statute on the part of the Eagle.

> "A steam vessel without lights cannot insist on too rigorous a lookout on the other vessel."
>
> *The Alice M. Guthrie*, 257 Fed. 472.

> "The fault on the scow's part (having no light which brought about the collision so far

outweighed in importance as causes tending to bring it about, any deficiency which can reasonably be imputed to the ferry boat's lookout from the fact that it was not kept from her bow, that she cannot justly be held responsible in any degree. Under such circumstances any reasonable doubt is to be resolved in her favor."

In re Eastern Dredging Co., 159 Fed. 548.

"While the Steamer Tarpon did not have a proper lookout I am not satisfied that the absence of such lookout caused the collision or that the presence of one would have availed to prevent it. Doubt must be resolved in her favor."

The Tarpon, 132 Fed. 277-279.

"The faults of the Mellinock were so glaring, so numerous and so fully do they account for the disaster that the court should not be particularly astute in the endeavor to discover some contributing fault on the part of the Persian committed at a time when inerrable judment is not to be expected."

The Persian, 224 Fed. 441.

The case then comes to this. It is an absolute certainty that the operators of the Eagle were flagrantly in fault and that such fault on their part was an efficient and a proximate cause of the collision; whereas it is at the most no more than a matter of speculation whether or not the absence of a lookout contributed. In such case the damages will not be divided.

Otto Marmet Coal Co. v. Fieger, Austin (supra).

"In case of unequal fault the gross fault is the cause of the loss and slight fault is immaterial—did not contribute."

The Lord O'Neill, 66 Fed. 77.

Ryan's statement.

Much is made by claimant of the statement of Ryan that if he had been looking over the port bow and watching closely he might have seen it (the Eagle), but this statement is not to be segregated from the question to which it is an answer. The question and answer are found on page 147, viz.:

Q. Yes, but with a moon now nearly full and half way up now on the horizon, clear night, not obscured, you could see the outline of the Eagle on the water some distance away, couldn't you?

A. If I had been looking over my port bow and watching closely I might have seen it.

Can claimant maintain that it was a clear moonlight night "not obscure"? To do so he must discredit all the witnesses, himself included. *Selig* says "When we got to black rock it got dark and calm.—A calm night like that is the worst you have to contend with. On any other night a ripple on the water shows light—With calm water it is just *the same as traveling in the woods* (237)—the moon was there—very cloudy over it (268)—you could only see it once in a while (311). *We weren't within the range of that moon* (268). *We had been running in the shadows for about twenty minutes before the collision* (260-4)—*that was the dangerous part of the trip* (260-1)—moon had just come up over the moun-

tains (264-8). Moon not yet bright—it was cloudy (268)—*it didn't light up the waters* (269); *and Mr. Kinyon*—"There was a moon at times—the moon was shining on the particular spot of the collision; part of the time before it was obscured by clouds (110); and *Ames* (223) and *the Answer* (17 & 18).

Clearly Ryan's answer to the said question is predicated on the conditions recited in the question, to wit "clear night, not obscured." But it was not a "clear night" and it was not "not obscured," on the contrary, on the water it was obscure and that obscureness would be intensified to one who gazed into it across a moon sheen. In *The Lituania,* 189 Fed. 560 (April 20, 1911), a schooner collided with steamer. The court found that the schooner displayed no lights, and said, "The only question in the case is whether the steamer is at fault, even then, for not seeing the schooner. I can hardly think so. I know of such nights as those that have been described by the witness where it is clear overhead and where it is exceedingly hard, *unless there is a light,* to see near the water * * * I doubt very much, under these circumstances whether a most diligent lookout would have discovered or could have discovered a schooner, if it had no lights out, in time to avoid the accident." Libel dismissed.

Ryan did not hear Eagle's exhaust.

It is contended that because Mr. and Mrs. Kinyon could hear and did hear the sound of the Eagle's exhaust therefore Ryan or a lookout could and should have heard it, and, so hearing, could and

should have known that said sound was made by a boat; but this conclusion does not follow, for the conditions were entirely different. It must be remembered that Mr. and Mrs. Kinyon were at the lighthouse in quietness and solitude, while Ryan was (and a lookout would have been) on the Wildwood which was going through the water at the rate of 10 feet per second, and the Wildwood's own exhaust and the sound of the water would drown, to him, the sound of the Eagle's exhaust,—especially as (according to Selig) the Eagle's exhaust "was half under water, and there is a brass outfit over that exhaust and it would throw the sound back toward Tree Point," and it is "a very quiet exhaust—lots of water—not a dry exhaust" (249). Did the Eagle hear the Wildwood's exhaust?

Dark object seen by Mrs. Kinyon.

It is said that Mrs. Kinyon saw the outline of the Eagle and that Ryan or an outlook could and should have seen it. It is submitted that a fair reading of her testimony does not bear out the statement that she could make out the outlines of the Eagle or even of any boat. The testimony is on page 100. She said, "Yes, I could discern an object barely with my naked eye, a dark object * * * If you see a log out there, you couldn't tell whether it was the end or the side of the log * * * I could see this dark object moving." The time she is there speaking of was "at that time"—"when they were dangerously close."

And too there is no evidence that the "dark object" which Mrs. Kinyon saw was the "dark object" which Ryan saw. The moon in the East would cause the shadows to fall westward. Mrs. Kinyon was to the westward of the boats and the Wildwood was nearer Mrs. Kinyon than was the Eagle. We know that the dark object Ryan saw was the Eagle emerging into the sheen, but the dark object Mrs. Kinyon saw might have been the shadow of the Wildwood or the shadow of the Eagle or the Eagle itself emerging into the sheen. About one second after Ryan saw the dark object the Eagle's lights were flashed on (145) and until the lights were flashed on he "didn't know whether it was a big log or a boat or just a shadow on the water" (147) and neither did Mrs. Kinyon—She refers to it as a "dark object" moving, but she could not tell which way it was moving. She knew the Eagle was out there but Ryan had no reason to suppose that there was any other vessel in the vicinity. Even if it be admitted that the "dark object" seen by her was the "dark object" seen by him, still there is no evidence that he did not see it as soon as she did—as soon as it appeared—as soon as it was discernible by any one at any distance.

The Kinyons were on an elevation.

It is claimed that as Kinyon saw the Eagle when a mile to the south of the lighthouse Ryan or a lookout would have likewise seen it; but Kinyon was on an elevated station, towit the porch of the lighthouse, and his attention had been called by the

exhaust and he expected to see a vessel and even then he could only see it through the glasses, and he was not looking across a sheen of the moon; while Ryan was not, and a lookout would not, have been expecting to see a vessel without lights, and he was on the Wildwood, a small boat—not on the porch of the lighthouse; and, too, he had to look across a sheen of the moon. Besides, Kinyon even with glasses saw it for about four minutes only (109). It is reasonable to assume that when he looked the intermittent glimpses of the moon helped the glasses. It does not appear whether the Wildwood was or was not equipped with glasses —presumably she was so equipped; but whether she was or was not so equipped, the Eagle, travelling in dark shadows at night without lights is in no position to insist that those on board the Wildwood should glue their eyes to glasses for the purpose of perceiving *them* in the act of violating the statute and recklessly inviting disaster to others and to themselves.

The evidence, then, shows that it is not probable that the fact that there was no lookout in the bow of the Wildwood, at all contributed. That, certainly, is as far as it is necessary to go to rebut the presumption, for it would of course be absolutely impossible to prove to a mathematical certainty what some one would have seen, if that same one had been at a particular place at a particular time. There can be only a balancing of probabilities. Surely it cannot be said that there is "no doubt" or

that the *contributory fault* of the Wildwood has been established by *"equally clear"* evidence.

After all, the rule of law that he who alleges causative negligence must prove it is not changed by presumptions,—the burden does not shift from him simply because he is allowed to prove by the aid of a presumption that which he is required to prove. The presumption is evidence in his favor, it is true, but the question still is, Has he proved by a preponderance of evidence that the alleged negligence *contributed?*—and in considering that question all the facts, circumstances and probabilities are to be weighed with a view of determining whether or not, (in a case of this kind where positive violation of statute and gross negligence *directly* causing the collision has been clearly shown) contributory negligence has been shown by "*equally* clear evidence"—all doubts on that score being resloved in the negative.

(b) The court's finding.

The trial court said: "However looking at the situation of the two boats as I find them to have been at the time of the collision, I am inclined to believe that the lack of a proper lookout on the Wildwood" was not a contributory cause of the collision. It appears from the testimony that Ryan, master of the "Wildwood," saw a black object which he thought to be a log, about two points off the starboard bow. Mrs. Kinyon also testified that just prior to the collision she saw a black object, which

she was unable to identify, but considered it to be a log just prior to the time of the accident. If it were, as Ryan supposes, a log which he saw, he, by keeping on his course, would have avoided it, but when the lights of the "Eagle" were flashed on, it was too late to avoid a collision. The proximate cause of the collision was the lack of lights on the "Eagle" up to the time when too late to avoid the collision. If the lights had been on the "Eagle" at the time when Ryan, the master of the "Wildwood," first saw the black object, the collision would have been avoided" (33-34).

Ryan saw the Eagle in time to avoid a collision and he did the right thing to avoid a collision; Ames saw the light of the Wildwood in time to avoid a collision, and he did the wrong thing and caused the collision. He said, "The Eagle takes the wheel immediately she is thrown over" (227); and Selig says that in 125 feet the Eagle will turn 16 compass points—half circle (243). The absence of a lookout on the Wildwood, then, was simply a condition, not a cause, of the collision.

The absence of a lookout immaterial, when

The Oregon, 158 U. S. 186;
The Annie Lindsley, 104 U. S. 185;
The Wanata, 95 U. S. 600;
The Geo. W. Elder, 196 Fed. 137, 9th Circuit;
The Wrestler, 144 Fed. 334;
The George Dumois, 153 Fed. 833;
Otto Marmet Coal Co. v. Fieger, 259 Fed. 427, 447;
The Elk, 102 Fed. 697.

(c) **An afterthought.**

In the answer appellant contended that the Wildwood solely was in fault and he enumerates her faults as consisting only of failure to exhibit lights, failure to sound a port helm whistle, and attempting to make a port to port passing. He there says nothing of the absence of a lookout in the bow or of failure to discern the Eagle and yet at that time he knew as much about those points as he knows now. At that time he realized that a lookout on the Wildwood would not have been effective to discern the Eagle, for in the Answer (Par. IV, pp. 18-19) he alleges that the Eagle kept "a sharp and vigilant lookout" (Ames and Olander) and that they did not and could not discern the Wildwood until she was within 50 or 60 feet of the Eagle." He says this inability was because of the absence of lights on the Eagle, and the evidence of Ames is to that effect. But the evidence in the case showed clearly that the Wildwood displayed lights and that the Eagle displayed none and that twenty minutes before the collision and up to the time of the collision the Eagle had been traveling in the shadows (Selig 261) and that the collision occurred in the sheen of the moon, and that the Wildwood did not attempt to make a port to port passing but that the Eagle did so attempt. He therefore executes an "about face," acknowledges his faults, and in his desperation seeks this "loop to hang a doubt upon."

(II) The claim that the Wildwood was in fault in failing to blow a whistle signifying "port to port"

before turning to starboard (Assignments Nos. 15 & 16).

Answer:

The lower court, on this point, said:

> "When the lights were flashed on the 'Eagle,' at the most four seconds only, perhaps less, ensued, before the collision and there was no opportunity to give him the signal. The right of way was with the 'Wildwood.' The approaching vessel was off the port bow apparently head on and the obvious thing for the helmsman of the 'Wildwood' to do was to immediately turn her to the starboard, and, in a case of extreme danger like this, the omission to signal cannot be considered a fault."

This was also the contention of the Eagle as evidenced by the Answer. Each vessel discovered the other at practically the same time. The Eagle sounded no whistle, but the Answer excuses her,—saying that "The time in which to act was so short that the failure to give whistle signals did not affect and could not in any manner have affected the situation which said colliding vessels were in prior to the coming together of said vessels." (Answer par. IV, p. 20). *In the Answer* appellant was contending for *sole* liability of the Wildwood and he could not afford to charge as a fault of the Wildwood a shortcoming of which the Eagle itself was guilty, *but now* that he is contending only for a *divided* liability he can afford to charge as shortcoming on the part of the Wildwood the very things which he had previously alleged to be excusable. By so doing he has "everything to gain *and nothing to*

lose.'' But we submit that the gate which he has erected still stands to bar his retreat.

Appellee, however, is not content to rest on the admission in the Answer nor on the finding of ''in extremis'' made by the court; for, irrespective of said admission and said finding, it is apparent that such omission did not contribute to the happening. Convincing evidence of this comes from Ames himself. The sounding of the whistle would have told Ames only this, to wit: to port his helm. That, however, is exactly what he should have done if he received no signal to starboard the helm, for that is the Rule of the Road. By his testimony that is what he did do. His contention is not that he was misled into doing the wrong thing, but that as a matter of fact he did not do the wrong thing. Ames says that the Eagle turned to starboard and that the Wildwood also turned to starboard. Assuming that Ames was sober and versed in the regulations he would have expected the Wildwood to do just what she did do, and assuming that Ames is telling the truth about the Eagle turning to starboard, he did just exactly what he would have done if Ryan had signalled a port to port passing. What effect then did Ryan's failure to sound the whistle have on Ames? The answer must be that it could have had no effect at all, for it did not cause him to do anything that he should not have done if the signal had been given.

Speaking of the omission to signal it is said,

> ''The decision of the question whether the failure to sound a signal contributed to the col-

> lision, will, however, often depend on the judgment of the Court, as to what would have been its effect on the mind of the man in charge of the other vessel if it had been sounded, and to answer this hypothetical question it will be frequently necessary to consider whether the omission could possibly have contributed to the collision. A practical test suggested in The Tempus is, would sounding the signal have made it easier for the other vessel to do something to avoid the collision. The statutory obligation to obey the regulations remains, so that it is negligence not to observe an applicable regulation * * * but the question whether a breach of the regulation *contributed* to the collision is one of pure fact for the court to decide on the whole of the evidence." Marsdon's Collisions at Sea, 7th Ed. pp. 70-71.

(III) The claim that Ryan (the Wildwood) was in fault in failing to stop, reverse and give the danger signal when he was in doubt about the dark object on the port bow. (Assignments Nos. 9, 10, 21).

Answer:

What was this dark object? When and where was it seen? How long was Ryan in doubt as to what it was? What did Ryan have time to do? What did he do and what should he have done? These are all pertinent inquiries.

For twenty minutes prior to the collision the Eagle had been and was traveling in the dark shadows without lights; the collision occurred in the sheen of the moon. The dark object was evidently the Eagle just emerging into the sheen from out the shadows in which it had been traveling.

The doubt in Ryan's mind as to what the dark object was, was of only an instant's duration. The quick flashing on of the Eagle's lights dissolved that doubt. Ryan says "and was holding her on her course *when all of a sudden* I thought I seen a shadow ahead and *just then* the lights of a boat flashed on headed straight at me on the port bow" (138) ;—Just then, i.e. immediately, i.e. within a half second or a second (139).

Appellant maintains that within that second or half second Ryan should have stopped, reversed and given the danger signal. Ryan did not do this, but he did something infinitely better—he "*promptly* swung the helm to port" (138) keeping his speed. What he did was the usual thing—the "to be expected" thing —the thing called for by the Inland Rules and the Rule of the Road and by "second nature"—he turned to the right as far as he could get, quick. If he had stopped his engines the Wildwood would not have stopped immediately, and the Eagle would have struck the Wildwood about midships. But by turning to starboard and keeping his speed, there was a chance to get out of the range of the Eagle, especially if the Eagle should do what she would naturally be expected to do and what the law required her to do (i. e. turn to her starboard). Ryan, then, was expressing it modestly when he said "I did the best that I could by throwing the boat hard to starboard and if he did the same thing probably we wouldn't have had the collision" (152). The lower court said, "If the Eagle had turned to the star-

board she would have cleared the Wildwood or at least have struck her only a glancing blow'' (30—bottom).

How much time was there between the flashing on of the Eagle's lights and the collision? The Eagle struck "not more than three or four seconds after she flashed on her lights'' (Ryan 139), ''It was such a short time there was no time for thinking'' (Mrs. Kinyon 102), ''Not more than two seconds—there was the flash of the light and then the impact'' (Mr. Kinyon 109). And yet, appellant would have Ryan occupy that time by stopping, reversing and giving a danger signal instead of doing his best to get away. Danger signal—for what? Was not the danger apparent and imminent? Would a danger signal have thrown any light when the two boats were in such close quarters, and when each knew of the presence of the other? Under such circumstances the danger signal would have been simply ''the last wail before the crash''.

The rules were made to prevent collisions and they are all subject to the general prudential rule that

> "In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, *and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger''* (Art. 27 Inland Rules).

The danger signal is to be given "when either vessel fails to understand the course or intention of

the other'' and is desirous of ascertaining that course and intention or to signify some danger. Here the collision was imminent. Ryan saw the Eagle's lights, 2 points off his port bow, heading right at him. That was no time to signal—to say "There is danger'' or to ask "What are you going to do?''—to wait for a reply and then to act. It was a time for movement and speedy movement at that—a time to get away as quickly as possible. To give a danger signal when the danger is apparent and imminent is "to say an undisputed thing in such a solemn way.'' Ryan tried to get away by turning to his starboard—Ames, we have no doubt, wanted to get away but he didn't know how—he turned to his port, which is just the thing he shouldn't have done. Was he drunk, or ignorant?

Nor can Ames be excused on the ground of error "in extremis'' because (1) he maintains he made no error, (2) error "in extremis'' cannot be invoked where the situation is produced by one's own fault, as this was, by his failure to display lights and to see the Wildwood's lights.

The Winona, 19 Wall 41;
The Dexter, 23 Wall 69;
The Albert Demos, 177 U. S. 240.

(IV) The claim that the Wildwood was in fault in not showing a range light (Assignment No. 19).

Answer:

The testimony shows that there was a range light —a regular light, lighted—on the pilot house—eight feet above the deck—not on same mast with the mast

headlight (276-7). This is not denied, except indirectly. The utmost that can be said is that no one had testified on that point—no one was asked about it—until at the very closing of the evidence (276-7). Besides what good would a range light have done? How would it have averted the collision? If the "sharp and vigilant" outlook of the Eagle could not and did not detect the side lights of the Wildwood, and did not detect the mast headlight of that vessel until it was fifty or sixty feet away, is it at all probable that a range light further away would have improved the vision or clarified the judgment or nerved the hand of the men in the Eagle's pilot house?

(V) The claim that the Wildwood was in fault, in that the master (Ryan) was not 21 years of age (Assignment Nos. 11 and 12).

Answer:

On this point the lower court said:

> "The question of the age of the master of the 'Wildwood' cannot be material * * *. It was not necessary, at the time of the accident, that the 'Wildwood' should have been in charge of a licensed master, for she was not, at that time, carrying passengers. Moreover, whether it was necessary or not, the master of the 'Wildwood' had received his license as such, presumably on the authority of the local inspectors and the owner of the 'Wildwood' was justified in relying upon that certificate. Again, I can discover no negligence or incompetency on the part of the master of the 'Wildwood' after the first discovery of the approach of the 'Eagle'. He acted promptly and did the necessary and obvious thing by sheering off to starboard. The

contention of the claimant on this point cannot be allowed" (32). See Sec. 5 Act approved June 9, 1910.

No enlargement is called for.

(VI) The claim that the Wildwood was in fault because the master was temporarily absent from the pilot house (Assignment No. 14).

Answer:

This claim is a mere clutching at straws. That Ryan did so leave the pilot house is testified to by him as follows: "Well about six or seven minutes before we got to Mary Island light I went down and hollered to Harold to get the course from Mary Island to Tree Point"; Harold gave him the course and Ryan went back and "put her on it" (138). Ryan just stepped out of the pilot house and "hollered down the companionway"—didn't go up to the companionway (275-6). This occurred six or seven minutes before they got to Mary Island light—and at about 3600 to 4200 feet north of the light (reckoning the Wildwood as going seven miles an hour or ten feet per second), and when the Eagle was approximately one mile to the south of the lighthouse, or nearly two miles distant from the Wildwood. It could have taken only a few seconds—20 or 30 seconds Ryan says (276). This short temporary absence from the pilot house at that time and place could not possibly have been a contributing cause, for it is to be remembered that Ryan had not, at that time, seen any "dark object" and there were no lights to see. Ryan very aptly says,

"I don't know as I would because when I was looking out at night I expected to see lights if a boat was in the distance" (147). He was back at his post in ample time and there is no evidence that he again left it.

In conclusion on this branch of the case, it is submitted that in the answer the only negligence charged to the Wildwood was "failure to exhibit lights" and "failure to signal" and "attempt to make a port to port passing". We have shown, we think, that it was not the Wildwood which failed to display lights—but, on the contrary, that it was the Eagle; that it was not the Wildwood which attempted to make a port to port passing but, on the contrary, that it was the Eagle; that the failure to sound the whistle could not possibly have been a contributing cause.

The answer called on libellant to meet only those charges made therein. He met them, but straightway is confronted by appellant with other specifications not theretofore mentioned. He has met them also.

Claimant was guilty of the grossest negligence directly causing the collision. He has not met the burden cast upon him by that negligence. On the contrary, he seeks to escape its full consequences by magnifying things of little or no bearing. To allow him to do so, would be (it seems to us) to put a premium on traveling by boats at night without lights, on ignorance, on unskilfulness, on flagrant violation of positive statute.

II

D

AS TO DAMAGES.

Damages were awarded to the Wildwood as follows, viz.: To the hull $1050; and for other items not involved in this appeal.

There is no assignment of error as to any of these allowances (See Waiver of Assignments, pp. 300 et seq.). Appellant is therefore concluded; but appellee contends that the sum ($1050) allowed as damages to the hull should be increased by $250 and that interest on all the items at 8% per annum from date of the collision, should be allowed.

Damage to the hull.

Immediately after the Wildwood was towed to Ketchikan her owner had her surveyed and estimates made of the repairs necessary and the cost of same (44). He had two rival ship building and repairing concerns examine and estimate. These estimates were made "with a job in view." The presumption is reasonable that each estimate was "figured down" as close as possible. The estimates were made by Otto Inman and George Thompson, the former representing his own concern and the latter representing Schlotan's Marine Railway or Northern Machine Works.

Inman's estimate was $1328, and Thompson's estimate was $1300 if a new keel was put in, and $1052.70 if no new keel was put in.

As the keel was split or cracked (54, 159, 160) by the collision (159 last question and 160) and as libellant was entitled to an uncracked keel, it is apparent that there was only $28.00 difference between the two bids.

Inman (52, 157, 226) was a man who had lived in Ketchikan for 31 years, during all of which time (and before) he had been in the boatbuilding business (52), was familiar with the Wildwood before the collision (56) having given her an overhauling in 1917 (43) and having frequently repaired her (43) and painted her only 6 months before the accident (159). He "figured" that the boat was then practically as good as new (56). After the collision he found her badly damaged (53). He got her out of the creek and made a thorough survey of her (53-54). He studied her over for two or three days (54). He found that the stern post was knocked clear out and broken, and the planking was cut through practically to the keel, the keel was cracked and the shaft and counter was all knocked out and "she was shook from the stern clear —drawed from her stern back seams all open, you could crawl through the side of her and timbers broken" (54) she was practically a total wreck (57), and yet her timbers were the "natural crooks" of the forest and she had been built extra heavy—strong (56).

Knowing what the boat had been and was at or about the time of collision, and having made a careful examination of her injuries, immediately after

those injuries were inflicted, and having "studied her over for two or three days," and with the knowledge that there was another boat building concern in Ketchikan and that it was to his interest to make as low an estimate as possible and having put "it all down even right up to the last nail, bolts and nails and all" (62), his estimate comes with convincing force. The lower court said that "he seems to have made the most complete examination of the hull" (36). When it is remembered that his competitor's bid is only $28 less than his, and that there is no evidence or intimation of collusion, there is no ground to say that the estimate of Thompson ($1300 including the keel) at least, is not a fair and reasonable estimate.

George Thompson (74).

Examined her last summer (summer of 1921—the accident was July 23, 1921) at the instance of libellant (74). His estimate was as above stated, $1302.50 including a new keel and $1052.50 without a new keel (75).

He recently also examined the hull and made an estimate for the claimant and his attorney (75). By getting him to make an estimate they attest the fact that they considered him a worthy "estimator". He gave them the same estimate but evidently his figures didn't suit them.

Thompson was a boatbuilder of 34 years' experience—3 years in Ketchikan (74-5). He found no decay, notwithstanding she was built in 1906 (114). "She's a pretty sound boat (82). She was struck

on the port side, but her timbers are sprung and the planking on the starboard side is six or eight inches off—out of plumb" (83).

The testimony of these two experienced men is entitled to the greatest weight and indeed it would seem should be determinative of the question.

Now as against the positive, careful, disinterested estimates of these two experienced boat builders made at the time of the injury, the claimant opposes the testimony of three witnesses, to-wit: C. C. Keesling, James Rasmussen and J. F. Radebaugh.

C. C. Keesling (161).

His examination was only "in a casual way" (162) and was made at the instance of claimant and his proctor (162) for the purpose of testifying (168). He examined her "only about half an hour" (168). This man actually offers to take the job for less than it will cost by his own figures. His estimate is $500 (163) and yet he figures $145 for material and $375 for labor (163)—total $520. In other words he will lose $20 on the job. Nay more—he figures ship building labor in Ketchikan at the middle of the fishing season—at $7.50 per day (165) whereas according to Mr. Radebaugh (another of claimant's witnesses) such labor brings $1.25 per hour or $10.00 per day (193). Labor which at $7.50 per day costs $375 would at $10 per day cost $500.

This man, an employe of the Forestry service (167) working by the day (171) never saw the Wildwood before the accident (168) and yet he as-

sumes to value the hull before the accident at $300 (166)—a hull which the uncontradicted evidence shows brought $350 under water (45) and on which her purchaser had spent $1300—which had been recently overhauled, which was kept in repair, painted, found to be "as good as new" and in which the witness himself "found no rot" (173)—a hull, too, which even the other two witnesses for claimant value at the time of the collision at two and three times the figure given by him (Rasmussen, p. 202, and Radebaugh, p. 187).

We submit that this testimony ought to be entirely disregarded.

James Rasmussen (204).

Nor is this witness entitled to any credence; for his testimony, too, is strange—very strange.

His business is "Well, gas engineer and working at odd times at boat repairing, too" (195)—"for the last year has worked on any repair work that comes along" (195). He had only a short experience as a boat repairer and the greater part of that has been as an underling (198). His estimate is $650 not including a new keel (195). A new keel would cost (according to him) $75 (199) but even if he had to put in a new keel he wouldn't raise the bid (199) —all of which means that he purposes to donate $75.00 for the boat needs a new keel. Another philanthropist. His estimate is even more remarkable than Keesling's for it includes not only $75 for keel but also $150 or $200 for *extra* material (200). Keesling did not figure on *extra* material. Keesling

says the material would cost $145. Then Rasmussen proposes the following, viz.:

To furnish new keel	$ 75.00
Material	145.00
Extra material	150.00
Labor 1 man 2 mos. @ $7.50 per day	450.00
Total	$820.00

If the new keel be included in "extra material" the figure is $820 less $75 or $745 or a loss of $95; but if we figure the labor at $10 per day the loss would be $150 more, or a total loss of $245. Compared to Rasmussen, Keesling is grasping.

Another evidence of the worthlessness of this man's testimony is the fact that he is willing to fix a value of $500 on an engine which he never saw and about which he knows nothing except that it is a second hand engine (197-202) and yet the uncontradicted testimony is that the engine cost Brindle $1200 in New Jersey (206) and actually stood him with freight and interest at $1800 (45).

We submit that the testimony of both Keesling and Rasmussen should be entirely disregarded.

The only other witness as to cost of these repairs was

Radebaugh (~~257~~).

He made no allowance whatsoever for a new keel (188-199). His was not a competitive bid with a job in view, as were Inman's and Thompson's. On the contrary it was for the purpose of testifying

for claimant and so is open to the suspicion which attaches to the testimony of experts, i. e. that their testimony is very apt to be so framed as not to disappoint the expectation of those whose experts they are. This suspicion cannot attach to Inman or Thompson for their estimates were made at a time when no lawsuit was in contemplation.

He did not make as thorough an examination as Inman.

As showing the superficial and unreliable character of Radebaugh's estimate it is only necessary to call the court's attention to same—Libellant's Ex. D [—this is libelant's exhibit although Radebaugh is claimant's witness. The reason for this appears on p. 191 and is as follows—"Mr. COSGROVE. Well then as counsel doesn't seem to desire to present this as an exhibit I would like to introduce it in evidence as part of the cross-examination"].

There is on file with the clerk, Respondent's Exhibit 4 which is not mentioned in the record. We think it must be the detailed estimate called for by Mr. Cosgrove at page 194, because (1) it is otherwise unaccounted for, (2) it contains the item $100 for sundries and Radebaugh is the only witness who testified to any such item. If it is the figures called for by Mr. Cosgrove, it shows that by Radebaugh's own testimony the sum of $1347.50 is his true estimate for it figures up $848 for lumber, $114.50 for hardware, paint. oakum, etc., $375 for labor, or a total of $1347.50, and this, too, without making any allowance for a keel. Somebody must have sworn to

this estimate or it would not be on file as an exhibit—it was not Inman or Thompson, so it must have been one of respondent's witnesses; if not Radebaugh's—whose?

The clear weight of the evidence is to the effect that this item of damages should be increased by $250.

Interest.

The libel was brought and tried with reasonable promptness. No tender of any kind was made. Interest and costs are in the discretion of the court. General Rule 30, sub. 4. Where there are no special circumstances affecting the matter, the general rule should be applied (*In re Great Lakes Dredging Co.,* 250 Fed. 916). Interest from time of collision (*The El Monte,* 252 Fed. 59). The statutory rate of the state governs (*Cambria S. S. Co. v. Pillsbury,* 212 Fed. 674). In Alaska rate is 8% (Section 684, C. L. A. 1913).

Dated, San Francisco,
February 17, 1923.

Respectfully submitted,

CHARLES H. COSGROVE,
Proctor for Appellee.

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